Capital Insurance Bhd v BS Sidhu

COURT OF APPEAL (KUALA LUMPUR) — APPLICATION NO W-08-534-1995
ABDUL MALEK AHMAD, ABU MANSOR AND NH CHAN JJCA
13 DECEMBER 1995

Civil Procedure *— Contempt of court — Breach of court order — Summary judgment entered against defendant in High Court — Defendant's appeal to Court of Appeal allowed — Court ordered plaintiff's counsel to return sum which had been deposited by defendant's counsel into his account earlier on immediately — Plaintiff's counsel was present in court when court pronounced order — Whether necessary for defendant's counsel to serve order on plaintiff's counsel for the return of sum — Rules of the High Court 1980 O 45 rr 5 & 7*

On 9 February 1995, the High Court at Shah Alam gave summary judgment under O 14 of the Rules of the High Court 1980 ('the RHC') against Capital Insurance Bhd ('the defendant'). The defendant's appeal to the Court of Appeal was allowed on 25 July 1995, and the court accordingly ordered the plaintiff's counsel to 'forthwith return the sum' which had been deposited by the defendant's counsel into his account earlier on ('the order'). The plaintiff's counsel, however, did not do so despite the fact that the defendant's counsel had sent two reminders on 25 July 1995 and 31 July 1995, calling for the return of that sum. The plaintiff's counsel claimed that he did not disobey the order, but the fact was the order was not served on him. On 13 October 1995, the defendant's counsel served the order on the plaintiff's counsel, who paid the sum on 14 October 1995. The defendant's counsel filed a notice of motion, praying for an order that the plaintiff's counsel be committed to prison for disobeying the order. The defendant's counsel submitted that the term 'forthwith' in the order meant 'without delay or immediately', and the delay of more than two months was unreasonable. He further alleged that it was unnecessary for him to serve the notice because the plaintiff's counsel, who was present at court, was aware of the terms of the order and had a duty to obey them as an officer of the court. As such, he said that the plaintiff's counsel had wilfully refused or neglected to pay the sum. The issue before the court was whether it was necessary to serve the order on the plaintiff's counsel, who was present in court when the court pronounced the order.

Held, dismissing the appeal:

(1) Although the plaintiff's counsel was present and heard the order directing him to refund the money deposited, nonetheless, he was required by O 45 r 7 of the RHC to be served with the order personally before he could be said to have wilfully disobeyed the order (see pp 5C–I and 6A); *Gordon v Gordon* [1946] 1 All ER 247 followed.

(2) Before contempt proceedings, which affect the liberty of a subject, can be enforced, there must be strict compliance with the rules that require the order of the court be served on the plaintiff's counsel. The court made no distinction that he was then the counsel and was present to hear the order. If he had been served with a sealed copy of the order according to the rules and had disobeyed, then the court could say in law that it was contempt. Since he had duly paid after service of the order, he had not committed any contempt (see p 6G–H).

[Bahasa Malaysia summary

Pada 9 Februari 1995, Mahkamah Tinggi di Shah Alam telah memberi penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') terhadap Capital Insurance Bhd ('defendan'). Rayuan defendan kepada Mahkamah Rayuan dibenarkan pada 25 Julai 1995, dan mahkamah telah membuat perintah yang mengarahkan supaya peguam plaintif 'dengan serta-merta memulangkan jumlah' yang telah didepositkan oleh peguam defendan ke dalam akaunnya sebelum itu ('perintah tersebut'). Walau bagaimanapun, peguam plaintif tidak berbuat demikian meskipun peguam defendan telah mengirim dua peringatan pada 25 Julai 1995 dan 31 Julai 1995 meminta supaya jumlah itu dipulangkan. Peguam plaintif berkata bahawa dia bukan ingin mengingkari perintah tersebut, tetapi sesungguhnya perintah tersebut tidak disampaikan ke atasnya. Pada 13 Oktober 1995, peguam defendan menyampaikan perintah tersebut ke atas peguam plaintif, yang membayar jumlah itu pada 14 Oktober 1995. Peguam defendan memfailkan satu notis usul, memohon perintah supaya peguam plaintif dipenjarakan kerana mengingkari perintah tersebut. Peguam defendan berhujah bahawa terma 'dengan serta-merta' dalam perintah tersebut bermakna tanpa kelewatan atau dengan segera, dan kelewatan melebihi dua bulan adalah tidak munasabah. Dia seterusnya mengatakan bahawa adalah tidak perlu untuk menyampaikan notis itu sebab peguam plaintif, yang hadir di mahkamah, sedar tentang terma perintah tersebut dan berkewajipan mematuhinya sebagai seorang pegawai mahkamah. Dengan itu, dia mengatakan bahawa peguam plaintif sengaja enggan membayar atau mengabaikan jumlah itu dengan sengajanya. Isu yang harus dipertimbangkan oleh mahkamah ialah sama ada perlu atau tidak untuk menyampaikan perintah tersebut ke atas peguam plaintif, yang telah hadir di mahkamah dan yang telah mendengar mahkamah mengumumkan perintah tersebut.

Diputuskan, menolak rayuan itu:

(1) Walaupun peguam plaintif hadir dan telah mendengar perintah tersebut mengarahkannya supaya membayar balik wang yang didepositkan, namun, mengikut A45 k7 KTN, adalah perlu untuk

menyampaikan perintah tersebut ke atas dirinya sendiri sebelum ianya boleh dikatakan beliau telah mengingkari perintah tersebut (lihat ms 5C–I dan 6A); *Gordon v Gordon* [1946] 1 All ER 247 diikut.

(2) Sebelum prosiding penghinaan, yang merupakan perkara yang boleh menjejaskan kebebasan seseorang rakyat, boleh dikuatkuasakan, harus terdapat pematuhan ketat dengan kaedah-kaedah yang menghendaki supaya perintah mahkamah disampaikan ke atas peguam plaintif. Mahkamah tidak membuat apa-apa perbezaan jika dia merupakan peguam dan hadir pada masa perintah tersebut dibuat. Jika dia telah disampaikan dengan sesalinan meterai perintah tersebut menurut kaedah-kaedah dan telah mengingkarinya, maka mahkamah boleh mengatakan bahawa ia merupakan penghinaan mengikut undang-undang . Oleh kerana dia telah membayar selepas penyampaian perintah tersebut, dia tidak melakukan apa-apa penghinaan (lihat ms 6G–H).]

Notes

For cases on contempt of court, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 788–837.

Case referred to

Gordon v Gordon [1946] 1 All ER 247

Legislation referred to

Rules of the High Court 1980 O 45 rr 5(1) & (7)

Manjit Singh (*B Balakumar with him*) (*Azim Ong & Krishnan*) for the applicant.

Yusuf Khan (*Terrance Marbeck and Sharon Sidhu with him*) (*Yusuf Lee Pathma & Marbeck*) for the respondent.

Cur Adv Vult

Abu Mansor JCA (delivering the judgment of the court): This is a notice of motion (encl 11A) of the applicant dated 2 November 1995, praying for an order that Encik BS Sidhu, the respondent herein (this motion) be committed to prison for disobeying the order of this court given on 25 July 1995, directing Encik Sidhu who was representing the respondent in the appeal before that court to forthwith refund all the monies which had been paid by the solicitors for the appellant on account of the fact that the appellant had succeeded in his appeal, and that he was allowed to defend his case unconditionally. After hearing arguments, we dismissed this motion with costs, and we now give our reasons.

It may be necessary to mention that, before we proceeded with this motion, we had dealt summarily with a separate motion (encl 11B) filed by Encik Sidhu, the respondent in this motion, praying for an order that the ex parte order granting leave to issue this motion for committal be set aside. At our instance, Encik Yusuf Khan, counsel for Encik Sidhu, was told by us that we would not be able to entertain his application, as the order for leave was obtained on an ex parte application. Encik Yusuf Khan did not insist on proceeding with his application to set aside the ex parte order granting leave to the applicant to apply for the committal of Encik BS Sidhu, and we dismissed his application.

We then proceeded to hear the applicant's main motion.

Encik Manjit Singh, counsel for the applicant, took us through the facts of this case as appeared in the affidavit of Mohd Khalid bin Abu Hassan, pengurus besar of the applicant. He referred us to Mahkamah Rayuan Civil Appeal No 02–155–1995 which arose from the decision of the High Court at Shah Alam, Selangor in Guaman Serial No 23–91–1994 ('the said suit') giving summary judgment under O 14 of the Rules of the High Court 1980 ('the RHC') against the appellant on 9 February 1995. What is necessary for us to mention, as stated above in this appeal, before this court on 25 July 1995, was that, the court allowed the appellant's appeal and made the order already referred to above.

Encik Manjit Singh contended that following that order dated 25 July 1995, he applied for the return of the sum ordered amounting to RM730,859.71, the sum which was deposited by the applicant's counsel into the account of the respondent. Counsel for the applicant said that he eventually had to write two letters, one on 25 July 1995, and the other on 31 July 1995, calling for the return of that sum. He submitted that the respondent herein wilfully refused or neglected to refund the sum ordered. The counsel for the applicant conceded that the order of the Court of Appeal on 25 July 1995 was not served on the respondent, but he contended that it was not necessary for the applicant's counsel to have done that because Encik Sidhu himself was present in court representing the respondent in that appeal, and was well aware of what this court's order was. He is an officer of the court and it was his duty to have obeyed the court's clear order. He prayed for the order asked for.

Encik Yusuf Khan in reply said, there was no deliberate refusal by the respondent to comply with the order of the court. There was also absence of any delay. In fact, the sum was paid to the applicant's counsel as per the terms of the order within 24 hours of the service of that order which took place on 13 October 1995 at 4.05pm, and the sum was in fact paid on 14 October 1995 at 12.35pm, a fact not disputed by the applicant.

As stated by Encik Manjit Singh at the commencement of his application, there was only one issue to be settled by this court. His complaint was the respondent's alleged disobedience to the order to pay from 25 July 1995 to 14 October 1995, despite the two letters requesting

A payment and the term 'forthwith' in the order meant, by way of definition, without delay or immediately. He submitted that a delay of more than two months from 25 July 1995 to 14 October 1995 was unreasonable.

It was common ground that the said order was not served during the period the respondent was alleged to have disobeyed. Encik Yusuf Khan
B contended that it was not that the respondent had disobeyed the order but the truth was that the order was not served on him. Was it necessary to have the order served in spite of the fact that the respondent was present in court and heard the court pronounce the order? The respondent's counsel referred us to O 45 rr 5(1) and 7 of the RHC:

C 5 (1) Where—

(a) a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time or, as the case may be, within that time as extended or abridged under Order 3, rule 5; or

D (b) a person disobeys a judgment or order requiring him to abstain from doing an act,

then, subject to the provisions of these rules, the judgment or order may be enforced by one or more of the following means, that is to say—

(i) with the leave of the Court, an order of committal;

E (ii) where that person is a body corporate, with the leave of the Court, an order of committal against any director or other officer of the body;

(iii) subject to the provisions of the Debtors Act, 1957, an order of committal against that person or, where that person is a body corporate, against any such officer.

F (2) Where a judgment or order requires a person to do an act within a time therein specified and an order is subsequently made under rule 6 requiring the act to be done within some other time, references in paragraph (1) of this rule to a judgment or order shall be construed as references to the order made under rule 6.

G 7 (1) In this rule references to an order shall be construed as including references to a judgment.

(2) Subject to Order 24 rule 16(3), Order 26 rule 7 (3), and paragraphs (6) and (7) of this rule, an order shall not be enforced under rule 5 unless—

H (a) a copy of the order has been served personally on the person required to do or abstain from doing the act in question; and

(b) in the case of an order requiring a person to do an act, the copy has been so served before the expiration of the time within which he was required to do the act.

I We were unanimous in our view that although the respondent was present and heard the order directing him to refund the money deposited, nonetheless, the respondent is required by the RHC to be served with the

order personally before he could be said to have wilfully disobeyed the order. We were fortified in our view by the case of *Gordon v Gordon* [1946] 1 All ER 247, a case cited by the respondent's counsel, where the appellant therein was the husband of the respondent in a case involving the custody of a child. The tussle between them resulted in the custody of the child to the marriage made in favour of the respondent wife with reasonable access to the appellant. While this was current and the child was with the appellant husband, he applied to rescind the custody order, and on 19 December 1945, the appellant husband, having acted in defiance, was ordered to hand over the child to the respondent by 20 December 1945, the term of which was, the appellant was ordered to hand over the child to the respondent by or before 7pm on 21 December 1945, but there was a delay and the copy of the order, however, came to be served on the appellant only at 8pm. It was contended by the appellant in a summons for non-compliance that the order made on 21 December 1945 was bad on the ground that it was served after the time for compliance has expired. It was contended by the respondent that there was no necessity for the service of the order because:

(a) the appellant was evading service;

(b) the court had inherent jurisdiction to commit a person for contempt.

It was held:

(i) since orders for committal and attachment affected the liberty of the subject, proceedings for contempt by disobedience of an order to do something outside the court could only be enforced if the rules relating to the process of committal or attachment had been strictly complied with;

(ii) on the facts, the service of the order in due time was necessary for the purpose of founding proceedings in contempt, the court having no power to dispense with the formal requirements of the rule.

As we have stated, we were unanimous in that we find merit in the argument of counsel for the respondent that before contempt proceedings, which affect the liberty of a subject, can be enforced, there must be strict compliance with the rules that require the order of the court be served on the respondent. And we make no distinction that he was then counsel and present hearing the order. If he had been served with a sealed copy of the order according to the rules and had disobeyed, then we can say in law that it is contempt. Since he had duly paid after service of the order, we say he had not committed any contempt. We hereby dismiss the motion with costs.

Order accordingly.

Reported by Isabel Liong